

ESTTA Tracking number: **ESTTA466436**

Filing date: **04/11/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204123
Party	Defendant Lavelle Industries, Inc.
Correspondence Address	PATRICK M. BERGIN DAVIS & KUELTHAU, S.C. 111 E KILBOURN AVE STE 1400 MILWAUKEE, WI 53202-6613 pbergin@dkattorneys.com
Submission	Motion to Suspend for Civil Action
Filer's Name	Patrick M. Bergin
Filer's e-mail	pbergin@dkattorneys.com
Signature	/Patrick M. Bergin/
Date	04/11/2012
Attachments	Motion to Suspend (11215656).PDF (3 pages)(78985 bytes) Exhibit A to Complaint (11215461).PDF (27 pages)(1286932 bytes) Exhibit B to Complaint (11215463).PDF (23 pages)(1469956 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Application
Serial No. 85/439,931
Filed: September 23, 2011
Published: February 28, 2012
Owner: Lavelle Industries, Inc.
For the Trademark: MAXPERFORMANCE

FLUIDMASTER, INC.
a California corporation

Opposer,

v.

Opposition No. 91204123

LAVELLE INDUSTRIES, INC.
a Delaware Corporation

Applicant

MOTION TO SUSPEND

Applicant Lavelle Industries, Inc. ("Lavelle") respectfully requests suspension of this proceeding pursuant to 37 C.F.R. § 2.117 because the parties to this instant proceeding are engaged in two civil actions concerning the registration application for the MAXPERFORMANCE mark.

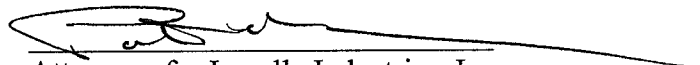
In the first-filed action, on February 20, 2012, Lavelle filed an action against Fluidmaster, Inc. ("Fluidmaster") alleging infringement of the MAXPERFORMANCE mark and related unfair competition claims in the Eastern District of Wisconsin. A copy of the Complaint filed by Lavelle is attached hereto as Ex. A.

On February 21, 2012, Fluidmaster filed a Declaratory Judgment action against Lavelle in the Central District of California alleging infringement of the MAX and PERFORMAX marks and requesting a declaration that it does not infringe the MAXPERFORMANCE trademark. A copy of the Complaint filed by Fluidmaster is attached hereto as Ex. B.

Applicant respectfully submits that resolution of the above-referenced civil actions will, at the very least, have a bearing on the issues before the Board. Trademark Rule 2.117(a) Accord 6 McCarthy on Trademarks and Unfair Competition § 32:47 (4th ed. updated June 2011) (“It is standard procedure for the Trademark Board to stay administrative proceedings pending the outcome of court litigation between the same parties involving related issues.”)

Therefore, to avoid duplicitous proceedings, Applicant respectfully requests that this opposition proceeding be stayed until termination of the above-referenced civil actions.

Respectfully Submitted,



Attorneys for Lavelle Industries, Inc.

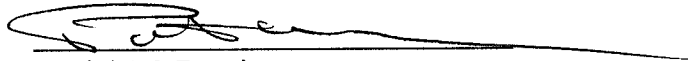
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414-278-3763 (direct fax)
pbergin@dkattorneys.com

CERTIFICATE OF MAILING

The undersigned certifies that the foregoing Motion to Suspend was mailed First Class Mail on April 11, 2012 to:

Richard P. Sybert
Gordon & Rees, LLP
101 West Broadway, Suite 1600
San Diego, California 92101-8217


Patrick M. Bergin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LAVELLE INDUSTRIES, INC.,
665 McHenry Street
Burlington, WI 53105,

Plaintiff,

Case No. _____

v.

Jury Trial Demanded

FLUIDMASTER, INC.,
30800 Rancho Viejo Road
San Juan Capistrano, CA 92675,

Defendant.

COMPLAINT

The Plaintiff, Lavelle Industries, Inc., by its undersigned attorneys, as and for its complaint against the Defendant, Fluidmaster, Inc., alleges as follows:

I. Nature of the Action

1. This is an action for infringement of a trademark and unfair competition, both of which are violations of 15 U.S.C. § 1125.

II. Jurisdiction and Venue

2. This is a civil action under the United States Trademark Act (15 U.S.C. § 1051 *et seq.*). This Court has jurisdiction pursuant to 15 U.S.C. § 1121, 28 U.S.C. § § 1331 and 1338.

3. Venue is proper in this district under 28 U.S.C. § 1391.

III. Parties

4. Plaintiff, Lavelle Industries, Inc. (“Lavelle”) is a Delaware corporation with a principal place of business at 665 McHenry Street, Burlington, WI 53105.

5. Defendant, Fluidmaster, Inc. (“Fluidmaster”) is a California corporation with a principal place of business at 30800 Rancho Viejo Road, San Juan Capistrano, CA 92675.

IV. Facts

6. Lavelle is a leading manufacturer of parts for the plumbing industry. In addition to offering a full line of plumbing parts, Lavelle manufactures a broad range of rubber parts for a wide variety of industries. Lavelle has been in business for one hundred (100) years as of this year and sells its products through a variety of outlets throughout the world.

7. Lavelle adopted the MAXPERFORMANCE trademark in early 2011 for use in connection with its toilet fill valves. Lavelle has a substantial investment of time, skill and other resources in developing the products sold under the MAXPERFORMANCE mark.

8. Lavelle owns United States Trademark Registration Application No. 85/430,931 (the “Application”) filed September 23, 2011 for the MAXPERFORMANCE trademark for use in connection with “toilet tank fill valves” and alleging first use of the mark in January 2011 and first use of the mark in commerce in March 2011. A copy of the Trademark Electronic Search System printout from the United States Patent and Trademark Office (“USPTO”) for the MAXPERFORMANCE trademark is attached hereto as **Exhibit A**.

9. The Application has been reviewed by the USPTO and the MAXPERFORMANCE trademark has been approved for publication on February 28, 2012. A copy of the official Notice of Publication for the MAXPERFORMANCE trademark is attached hereto as **Exhibit B**.

10. Lavelle began selling its toilet tank fill valves under the MAXPERFORMANCE trademark in March 2011 and has spent substantial sums on marketing toilet tank fill valves under the MAXPERFORMANCE mark. A copy of a photograph of its product packaging under the MAXPERFORMANCE trademark is attached as **Exhibit C**.

11. Lavelle sells toilet tank fill valves under the MAXPERFORMANCE trademark through its authorized distributors.

12. Lavelle exercises great care in the selection of its distributors and exerts substantial effort to control the nature and quality of the goods provided by such entities under the MAXPERFORMANCE trademark.

13. In October 2011, Lavelle became aware that Fluidmaster was selling toilet fill valves under the name PERFORMAX. A copy of a photograph of the product packaged and sold by Fluidmaster under the PERFORMAX trademark is attached as **Exhibit D**.

14. Fluidmaster advertises, sells and offers for sale toilet fill valves bearing the PERFORMAX mark to end consumers through retailers within this District and throughout the United States.

15. On October 21, 2011, Lavelle sent Fluidmaster a cease and desist letter advising Fluidmaster of Lavelle's ownership of the MAXPERFORMANCE mark and of its federal registration application for that mark and demanding that Fluidmaster cease and desist immediately from the use of Fluidmaster's PERFORMAX name with toilet fill valves. A copy of Lavelle's letter to Fluidmaster is attached as **Exhibit E**.

16. On November 9, 2011, Fluidmaster responded, asserting that the MAXPERFORMANCE mark is generic or descriptive and not registrable or enforceable. Fluidmaster further stated that "in the unlikely event that the USPTO issues a registration for this

mark, we will certainly petition for its cancellation.” In this initial letter, Fluidmaster also claimed that it “may well be that Fluidmaster’s use (of the PERFORMAX mark) predates Lavelle’s.” A copy of the Fluidmaster’s response to Lavelle is attached as **Exhibit F**.

17. In that priority is a critical aspect of trademark infringement, on November 15, 2011, Lavelle requested evidence of Fluidmaster’s use of the PERFORMAX mark, via letter dated November 15, 2011. A copy of Lavelle’s letter dated November 15, 2011 is attached hereto as **Exhibit G**.

18. On November 20, 2011, by letter, Fluidmaster declined to provide evidence of its use of the PERFORMAX mark and reiterated its other claims. A copy of the Fluidmaster’s email dated November 20, 2011 is attached hereto as **Exhibit H**.

19. On November 14, 2011, Fluidmaster filed a registration application for the PERFORMAX mark claiming an October 3, 2011 date of first use. A copy of the USPTO’s Trademark Search System Status page showing the Fluidmaster’s application to register the PERFORMAX mark is attached as **Exhibit I**.

20. On January 18, 2012, the MAXPERFORMANCE mark was approved for publication by the United States Patent and Trademark Office. Lavelle received the official Notice of Publication on February 8, 2012 advising that the MAXPERFORMANCE mark appeared to be entitled to registration.

21. The USPTO would have refused registration of the MAXPERFORMANCE mark on the Principal Register if, in its view, the MAXPERFORMANCE mark was merely descriptive or generic,

22. Lavelle further advised Fluidmaster that Fluidmaster’s filing of a registration application for the PERFORMAX name amounted to an assertion that the PERFORMAX name

could function as a mark and was inconsistent with its assertion that the MAXPERFORMANCE mark could not function as a mark. A copy of Lavelle's letter dated January 23, 2012 is attached hereto as **Exhibit J**.

23. Fluidmaster responded again on February 14, 2012 indicating that it intended to file a Notice of Opposition before the Trademark Trial and Appeal Board opposing registration of Lavelle's MAXPERFORMANCE mark on the grounds that it is "simply and completely a generic and descriptive term" and that "it is not registrable or enforceable." In that same letter, Fluidmaster argued that its PERFORMAX name is suggestive and therefore registrable. A copy of Fluidmaster's letter dated February 14, 2012 is attached hereto as **Exhibit K**.

24. The use by Fluidmaster of the PERFORMAX name is likely to cause confusion or mistake or deception of purchasers as to the source or origin of its goods, thereby resulting in a loss of sales by Lavelle.

25. Lavelle has no control over the quality of the goods sold by Fluidmaster and because of the confusion as to the source engendered by Fluidmaster, Lavelle's valuable goodwill in respect to its aforesaid trademark is at the mercy of Fluidmaster, particularly if the goods sold by Fluidmaster are of lesser quality than those made or supplied by Lavelle.

26. Fluidmaster is well aware of Lavelle's rights in and to Lavelle's products, its registered trademarks and the MAXPERFORMANCE trademark due to years of side-by-side selling of the parties' respective products.

27. Fluidmaster's intentional use of the PERFORMAX name is targeted to cause damage to Lavelle in Wisconsin, where Lavelle has its headquarters and production facilities in that Fluidmaster's infringing activities will cause a loss of sales of toilet tank fill valves under the MAXPERFORMANCE trademark.

28. Lavelle has a strong interest in preventing unauthorized persons from using the MAXPERFORMANCE trademark in connection with the manufacture, sale, or advertisement of toilet tank file valves.

29. Lavelle has been and continues to be damaged by Fluidmaster's actions.

30. The goodwill of the Lavelle's business under its MAXPERFORMANCE trademark is of great value, and Lavelle will suffer irreparable harm should infringement be allowed to continue to the detriment of its trade reputation and goodwill.

31. Fluidmaster's infringement will continue unless enjoined by this court.

32. Fluidmaster's infringement has been willful and deliberate and is specifically designed and targeted to trade upon the goodwill associated with Lavelle's MAXPERFORMANCE trademark.

33. The public interest will be furthered by enjoining Fluidmaster's wrongful conduct, as such, an injunction will protect members of the public from confusion and deception into thinking, incorrectly, that Fluidmaster's products sold under the PERFORMAX name are licensed by or otherwise lawfully associated with Lavelle or its MAXPERFORMANCE mark.

FIRST CAUSE OF ACTION TRADEMARK INFRINGEMENT

34. Lavelle repeats and realleges the allegations of Paragraphs 1 through 33 above as if fully set forth herein.

35. Fluidmaster's actions constitute a false designation of origin in violation of 15 U.S.C. § 1125(a) which is likely to cause confusion, mistake or to deceive and has confused and deceived consumers into believing that the solicitations on behalf of Fluidmaster are affiliated with, sponsored by, or somehow connected with Lavelle.

36. As a direct and proximate result of Fluidmaster's unlawful use of the PERFORMAX mark, Lavelle has suffered and will continue to suffer damages in an amount to be ascertained at trial.

37. Fluidmaster's infringement of Lavelle's trademark rights has been intentional and willful, making this case exceptional within the meaning of 15 U.S.C. § 1117.

SECOND CAUSE OF ACTION UNFAIR COMPETITION

38. Lavelle repeats and realleges the allegations of Paragraphs 1 through 33 above as if fully set forth herein.

39. The MAXPERFORMANCE mark is distinctive, has been used throughout the United States and elsewhere, and is well known to distributors in the trade and relevant consumers.

40. Fluidmaster's distribution, sale, and offering for sale, of identical and related goods in connection with a mark virtually identical to the MAXPERFORMANCE mark constitutes false designation of origin or sponsorship of such goods and tends falsely to represent that Fluidmaster's goods originate from Lavelle or that said goods have been sponsored, approved, authorized or licensed by Lavelle or are in some way affiliated or connected with Lavelle or worse, that Lavelle's goods and originate from Fluidmaster or are sponsored, approved, authorized or licensed by Fluidmaster all in violation of 15 U.S.C.A. §1125(a).

41. As a direct and proximate result of Fluidmaster's unlawful use of the PERFORMAX mark, Lavelle has suffered and will continue to suffer damages in an amount to be ascertained at trial.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, Lavelle Industries, Inc., prays that this Court enter judgment in its favor and against Defendant, Fluidmaster, Inc., granting the following relief:

A. That Fluidmaster, its officers, partners, employees, agents, parents, subsidiaries, affiliates, attorneys, and any one acting or participating with any of them be preliminarily and permanently enjoined from:

i. Using the PERFORMAX name or any other names, words, designations or symbols consisting of, incorporating in whole or part, or otherwise similar to the MAXPERFORMANCE mark or any other Lavelle trademark;

ii. Engaging in false designation of origin, false description, false advertising, false representations or otherwise engaging in unfair business or deceptive trade practice or unfairly competing with Lavelle;

iii. Any other conduct that is likely to cause confusion, or to cause mistake, or to deceive as to the source, affiliation, connection or association of Fluidmaster's products with those of Lavelle's.

B. That Fluidmaster be ordered to pay Lavelle all profits realized by Fluidmaster by reason of the unlawful acts by Fluidmaster as set forth in this Complaint (15 U.S.C. § 1117).

C. That Fluidmaster be ordered to pay Lavelle all damages suffered by Lavelle by reason of Fluidmaster's trademark infringement, and unfair competition as set forth in this Complaint (15 U.S.C. § 1117(a)).

D. That the Court award Lavelle treble damages because of the intentional, unlawful acts of Fluidmaster as set forth in this Complaint (15 U.S.C. § 1117(a)).

E. That Fluidmaster be ordered to pay Lavelle punitive or exemplary damages as provided by law.

F. That Fluidmaster be ordered to pay Lavelle the cost of this action and reasonable attorneys' fees (15 U.S.C. § 1117(a)).

G. That Lavelle shall have such other relief as this Court may deem just and proper.

DEMAND FOR A JURY TRIAL

Plaintiff, Lavelle Industries, Inc., hereby demands a jury trial as to the above cause of action.

Dated: February 20, 2012.

s/Matthew R. McClean

Matthew R. McClean (WI Bar No. 1041470)

John T. Domaszek (State Bar No. 1045877)

Patrick M. Bergin (WI Bar No. 1037754)

Joseph S. Heino (WI Bar No. 1003931)

Attorneys for Lavelle Industries, Inc.

Davis & Kuelthau, s.c.

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MAXPERFORMANCE

Word Mark	MAXPERFORMANCE
Goods and Services	IC 011. US 013 021 023 031 034. G & S: toilet tank fill valves. FIRST USE: 20110100. FIRST USE IN COMMERCE: 20110300
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85430931
Filing Date	September 23, 2011
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	February 28, 2012
Owner	(APPLICANT) Lavelle Industries, Inc. CORPORATION DELAWARE 665 McHenry Street Burlington WISCONSIN 53105
Attorney of Record	Patrick M. Bergin
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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EXHIBIT A



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451
www.uspto.gov

Feb 8, 2012

NOTICE OF PUBLICATION

- | | |
|--------------------------------------|---|
| 1. Serial No.:
85-430,931 | 2. Mark:
MAXPERFORMANCE
(STANDARD CHARACTER MARK) |
| 3. International Class(es):
11 | |
| 4. Publication Date:
Feb 28, 2012 | 5. Applicant:
Lavelle Industries, Inc. |

The mark of the application identified appears to be entitled to registration. The mark will, in accordance with Section 12(a) of the Trademark Act of 1946, as amended, be published in the *Official Gazette* on the date indicated above for the purpose of opposition by any person who believes he will be damaged by the registration of the mark. If no opposition is filed within the time specified by Section 13(a) of the Statute or by rules 2.101 or 2.102 of the Trademark Rules, the Commissioner of Patents and Trademarks may issue a certificate of registration.

Copies of the trademark portion of the *Official Gazette* containing the publication of the mark may be obtained from:

The Superintendent of Documents
U.S. Government Printing Office
PO Box 371954
Pittsburgh, PA 15250-7954
Phone: 202-512-1800

By direction of the Commissioner.

Email Address(es):

pbergin@dkattorneys.com

EXHIBIT B



EXHIBIT C



EXHIBIT D



VIA OVERNIGHT

October 21, 2011

Fluidmaster, Inc.
Attn: Attorney Michael C. Carroll
General Counsel
30800 Rancho Viejo Road
San Juan Capistrano, CA 92675

RE: U.S. Reg. App. Ser. No. 85/430,931 for MAXPERFORMANCE Trademark
Our Client: Lavelle Industries, Inc.
Our File No.: 17761.84246

Dear Attorney Carroll:

We represent Lavelle Industries, Inc. ("Lavelle"), owner of the MAXPERFORMANCE trademark and applicant under Application Serial No. 85/430,931 for federal registration of that mark. The goods identified in that application are "toilet tank fill valves." Lavelle sells product under the mark, as referenced in the attached Item A.

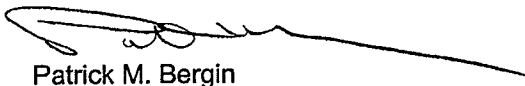
Lavelle has directed our attention to your recent adoption and use of the name PERFORMAX in connection with products that are functionally identical to those sold by Lavelle under the MAXPERFORMANCE mark. Your use of the name PERFORMAX on such goods is likely to cause confusion among consumers and therefore violates Lavelle's rights under federal and state trademark law and further constitutes unfair competition.

Lavelle takes the protection of its trademark rights very seriously. Therefore, on behalf of Lavelle, we request that you provide us, within fourteen (14) days of your receipt of this letter, written assurances that you will cease all use of the name PERFORMAX, that you will retrieve all existing uses of the PERFORMAX name and that you will not make any further infringing uses of Lavelle's MAXPERFORMANCE mark and confusingly similar variants thereof.

If you fail to so advise us within that time period, our client reserves the right to, without further notice to you, take such action as it deems advisable to assert its statutory rights and to otherwise protect its interests. Please direct all further communication concerning this matter to the undersigned. We look forward to your prompt reply.

Sincerely,

Davis & Kuelthau, s.c.



Patrick M. Bergin

PB:dau
cc: Todd Talbot, President
Client
Joseph S. Heino, Esq.

Phone 414.276.0200 Direct 414.225.7563 Fax 414.278.3763
111 E. Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202
pbergin@dkattorneys.com

EXHIBIT E

BROOKFIELD | GREEN BAY | MADISON | MILWAUKEE | OSHKOSH | SHEBOYGAN

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GORDON & REES LLP

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WWW.GORDONREES.COM

November 9, 2011

by email pbergin@dkattorneys.com

Mr. Patrick M. Bergin
Davis & Kuelthau, s.c.
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, Wisconsin 53202

re: **Your letter to Fluidmaster dated October 21, 2011 re "Maxperformance"**

Dear Mr. Bergin:

Your letter dated October 21, 2011 to Mr. Michael Carroll, the General Counsel of Fluidmaster, Inc., has been referred to me.

We disagree with you that your client's purported mark "Maxperformance" is a valid trademark. Rather, it is simply and completely a generic and descriptive term that means, precisely as stated, "max (or maximum) performance." It is also merely laudatory. As such, it is not registrable or enforceable. In the unlikely event that the USPTO issues a registration for this mark, we will certainly petition for its cancellation. Moreover, given that the mark is merely descriptive/generic, it is also weak. Any differences, such as those in Fluidmaster's mark, will be recognized by consumers in differentiating the source of the respective products.

In the meantime, Fluidmaster indeed uses the mark PERFORMAX for its goods and services, as do a large number of businesses for a wide variety of goods and services. The mark is relatively dilute. We note that your client's claimed date of first use in the United States is March of this year. It may well be that Fluidmaster's use predates Lavelle's.

We therefore disagree that your client has valid claims for trademark infringement or unfair competition.

We have also noted your client's registered mark KORKY'S EASYFIX. We question as well the validity of this mark in barring other uses of "Easyfix." The "Korky's" part of "Korky's Easyfix" is the obvious dominant portion of that mark. Any use of "easy fix" will be disregarded by consumers who will look for other indicators of source.

CALIFORNIA ♦ NEW YORK ♦ TEXAS ♦ ILLINOIS ♦ NEVADA ♦ ARIZONA ♦ COLORADO
WASHINGTON ♦ OREGON ♦ NEW JERSEY ♦ FLORIDA ♦ GEORGIA ♦ CONNECTICUT

EXHIBIT F

November 9 27, 2011
Page 2

If your client has any interest in exploring a co-existence agreement or other resolution of these matters, Fluidmaster is willing to discuss it. Otherwise, Fluidmaster declines to accede to the demands in your letter.

Thank you for your attention to this matter.

Yours truly,

A handwritten signature in black ink, appearing to read "Richard P. Sybert", with a horizontal line extending to the right.

Richard P. Sybert



November 15, 2011

VIA EMAIL RSybert@gordonrees.com

Richard P. Sybert, Esq.
Gordon & Rees LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101

Re: Lavelle Industries, Inc. v. Fluidmaster, Inc.
Re: MAXPERFORMANCE

Dear Atty. Sybert:

Thank you for your letter dated November 9, 2011. If, as you allege may be the case, your client's use of the PERFORMAX name predates Lavelle's use of its MAXPERFORMANCE mark, please provide appropriate evidence of your client's use of the PERFORMAX name at your earliest convenience.

Regards,

Davis & Kuelthau, s.c.



Patrick M. Bergin

cc: Joseph S. Heino, Esq.
Client

Phone 414.276.0200 Direct 414.225.7563 Fax 414.278.3763
111 E. Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202
pbergin@dkattorneys.com

EXHIBIT G

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Bergin, Patrick M.

From: Richard Sybert [RSybert@gordonrees.com]
Sent: Sunday, November 20, 2011 2:06 AM
To: Bergin, Patrick M.
Subject: FW: Lavelle Industries v. Fluidmaster: MAXPERFORMANCE
Importance: High
Follow Up Flag: Follow up
Flag Status: Red
Attachments: 2082_001.pdf

Dear Mr. Bergin:

My client is under no obligation to provide you with evidence of anything. We are not in the business of providing informal discovery.

Your letter purposefully picks up on the smallest item in mine and ignores everything else. So let me repeat the main points:

We disagree with you that your client's purported mark "Maxperformance" is a valid trademark. Rather, it is simply and completely a generic and descriptive term that means, precisely as stated, "max (or maximum) performance." It is also merely laudatory. As such, it is not registrable or enforceable. Moreover, given that the mark is merely descriptive/generic, it is also weak. Any differences, such as those in Fluidmaster's mark, will be recognized by consumers in differentiating the source of the respective products. The alleged mark is also quite dilute; a large number of businesses use the mark PERFORMAX or variants for a wide variety of goods and services.

We therefore disagree that your client has valid claims for trademark infringement or unfair competition.

We have also noted your client's registered mark KORKY'S EASYFIX. We question as well the validity of this mark in barring other uses of "Easyfix." The "Korky's" part of "Korky's Easyfix" is the obvious dominant portion of that mark. Any use of "easy fix" will be disregarded by consumers who will look for other indicators of source.

If your client has any interest in exploring a co-existence agreement or other resolution of these matters, Fluidmaster is willing to discuss it.

Otherwise, Fluidmaster declines to accede to the demands in your original letter.

Yours truly,
 Richard Sybert

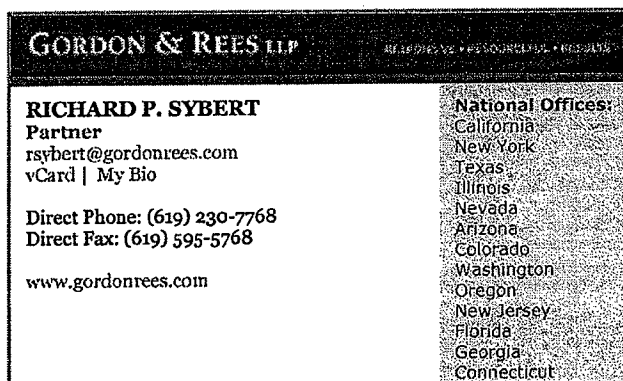


EXHIBIT H

12/2/2011

From: Upchurch, Dyer A. [mailto:dupchurch@dkattorneys.com] **On Behalf Of** Bergin, Patrick M.
Sent: Tuesday, November 15, 2011 1:34 PM
To: Richard Sybert
Cc: Bergin, Patrick M.; Heino, Joseph S.; Upchurch, Dyer A.
Subject: Lavelle Industries v. Fluidmaster: MAXPERFORMANCE
Importance: High

Dear Attorney Sybert:

Please find attached correspondence pertaining to the above-referenced matter.

If you have any questions, please feel free to contact Attorney Bergin.

Thank you.

Dyer A. Upchurch
Legal Assistant to Patrick M. Bergin, Esq.

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GORDON & REES LLP
<http://www.gordonrees.com>

12/2/2011



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PERFORMAX

Word Mark	PERFORMAX
Goods and Services	IC 011. US 013 021 023 031 034. G & S: toilet fill valves. FIRST USE: 20111003. FIRST USE IN COMMERCE: 20111003
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85471431
Filing Date	November 14, 2011
Current Filing Basis	1A
Original Filing Basis	1A
Owner	(APPLICANT) Fluidmaster, Inc. CORPORATION CALIFORNIA 30800 Rancho Viejo Road San Juan Capistrano CALIFORNIA 92675
Attorney of Record	Susan B. Meyer
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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EXHIBIT I

January 23, 2012

VIA EMAIL RSybert@gordonrees.com

Richard P. Sybert, Esq.
Gordon & Rees LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101

Re: Lavelle Industries, Inc. v. Fluidmaster, Inc.
Re: MAXPERFORMANCE

Dear Atty. Sybert:

This communication is in direct response to your November 20, 2011 e-mail to my partner, Pat Bergin, and a follow-up to our original October 21, 2011 letter sent to your client's general counsel, Michael Carroll.

You are correct – your client is under no obligation to provide us with evidence of anything. However, your client's recently-filed registration application for the PERFORMAX name provides us with what we were looking for – a date of first use of that name by your client which is well after the date our client started using its MAXPERFORMANCE mark. As an aside, the fact that your client decided to file a registration application of its own for the PERFORMAX name, in our humble opinion, renders as disingenuous your assertion that the MAXPERFORMANCE mark is "simply and completely a generic and descriptive mark." We obviously disagree with that assertion and, quite apparently, the United States Patent and Trademark Office ("PTO") does as well.

We have intentionally waited to receive confirmation from the PTO that it agrees with our position that Lavelle, Inc.'s MAXPERFORMANCE mark is a valid mark before contacting you again. We are pleased to inform you that the MAXPERFORMANCE mark was approved for publication by the PTO yesterday.

In view of the foregoing, we renew the demands asserted in our October 21, 2011 letter and request your response to those original demands no later than the close of business on Friday, January 27, 2012.

Sincerely,

Davis & Kuelthau, s.c.


Joseph S. Heino

cc: Patrick M. Bergin, Esq.
Client

Phone 414.276.0200 Direct 414.225.7563 Fax 414.276.3763
111 E. Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202
pbergin@dkattorneys.com

EXHIBIT J

BROOKFIELD | GREEN BAY | MADISON | MILWAUKEE | OSHKOSH | SHEBOYGAN

www.dkattorneys.com

N:\DOCS\17761\84246\11160019

RICHARD P. SYBERT, PARTNER
EMAIL RSYBERT@GORDONREES.COM
DIRECT LINE (619) 230-7768
DIRECT FAX (619) 595-5768

GORDON & REES LLP

ATTORNEYS AT LAW
101 W. BROADWAY, SUITE 2000
SAN DIEGO, CA 92101
PHONE: (619) 696-6700
FAX: (619) 696-7124
WWW.GORDONREES.COM

February 14, 2012

by email jheino@dkattorneys.com

Mr. Joseph S. Heino
Davis & Kuelthau, s.c.
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, Wisconsin 53202

re: Your letter to dated January 23, 2012 re "Maxperformance"

Dear Mr. Heino:

I have received your letter dated January 23, 2012, which demanded a response in four days after you had waited two months to respond to our own prior correspondence. (Incidentally, may I also ask if there is some local Wisconsin convention of addressing lawyers as "Attorney" Sybert? Otherwise, I believe the normal protocol is "Mr.")

As previously noted, we simply disagree with you that your client's purported mark "Maxperformance" is a valid trademark. Rather, it is simply and completely a generic and descriptive term that means, precisely as stated, "max (or maximum) performance." It is also merely laudatory. As such, it is not registrable or enforceable. We therefore intend to file a Notice of Opposition as soon as the mark is published for opposition February 28, 2012.

We also do not agree with you that this same rationale is applicable to my client Fluidmaster's application to register PERFORMAX (much less that there is anything "disingenuous" about that application). There is no word in the English language "Performax," which is suggestive. "Maximum Performance" or "Max" Performance, by contrast, is purely descriptive and arguably generic. That is likely the reason that there are many other "performax" marks at the PTO (101, with 34 live), than there are "maxperformance" marks (only 2 live and none dead). No one wants such a weak mark that, like your client's, provides virtually no source recognition power. And as I am sure you are aware, the TTAB gives little "elbow room" to weak marks. Because your client's mark is weak, descriptive, and laudatory, and therefore consumers will look to other indicators of source. For example, any differences, such as those in Fluidmaster's mark, will be recognized by consumers in differentiating the source of the respective products.

As to date of first use, while unnecessary to the above analysis, I am sure you are aware that dates of first use are in fact specified as "*at least as early as x.*" It is entirely possible, therefore, that discovery will show an earlier date by Fluidmaster. Indeed, internal documents

CALIFORNIA ♦ NEW YORK ♦ TEXAS ♦ ILLINOIS ♦ NEVADA ♦ ARIZONA ♦ COLORADO
WASHINGTON ♦ OREGON ♦ NEW JERSEY ♦ FLORIDA ♦ GEORGIA ♦ CONNECTICUT

EXHIBIT K

February 14, 2012
Page 2

already identify commercial treatment of PERFORMAX at Fluidmaster as early as May 2, 2011, and I have no doubt we would find even earlier use if pressed to do so. Meanwhile, your client used "00" for its own dates for "Maxperformance" in January 2011 (use anywhere) and March 2011 (commerce), which suggests someone guessed on those dates and didn't check them carefully. If it comes to that, priority is not a fight you can be sure of winning.

We therefore continue to disagree that your client has valid claims for trademark infringement or unfair competition. Should you assert any such claims, we will vigorously contest them and assert appropriate counterclaims.

Again, if your client has any interest in exploring a co-existence agreement or other resolution of this matters, Fluidmaster is willing to discuss it. Otherwise, Fluidmaster declines to accede to the demands in your original letter dated October 21, 2011 and reiterated since then.

Yours truly,

A handwritten signature in black ink, appearing to read 'Richard P. Sybert', with a long horizontal flourish extending to the right.

Richard P. Sybert

UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

LAVELLE INDUSTRIES, INC.,

Plaintiff

v.

FLUIDMASTER, INC.,

Defendant

)
)
)
)
)
)
)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

Fluidmaster, Inc.
c/o Mr. Stephen T.D. Dixon, Agent for Service of Process
30800 Rancho Viejo Road
San Juan Capistrano, CA 92675

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Matthew R. McClean, Esq.
Davis & Kuelthau, s.c.
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

JON W. SANFILIPPO
CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*: _____
_____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

Place an "X" in the appropriate box: ☐ Green Bay Division ☒ Milwaukee Division

I. (a) PLAINTIFFS

Lavelle Industries, Inc.
665 McHenry Street, Burlington, WI 53105

(b) County of Residence of First Listed Plaintiff **Racine**
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Davis & Kuelthau, s.c., 111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202

DEFENDANTS

Fluidmaster, Inc.
30800 Rancho Viejo Road, San Juan Capistrano, CA 92675

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition) <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIW W (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
15 U.S.C. Section 1125

Brief description of cause:

Infringement of Trademark and Unfair Competition

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$**

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

02/20/2012

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

Case 2:12-cv-00172 Filed 02/20/12 Page 1 of 2 Document 1-13

APPL. FILED

FILED

JUDGE

FILED

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.**

Example:

U.S. Civil Statute: 47 USC 553

Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Richard P. Sybert (SBN: 080731)
 Susan B. Meyer (SBN: 204931)
 Hazel Mae B. Pangan (SBN: 272657) →
 GORDON & REES LLP
 101 West Broadway, Suite 2000
 San Diego CA 92101
 Telephone: (619) 696-6700
 Facsimile: (619) 696-7124

John A. Bruche
2/23/12
 COPY

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

FLUIDMASTER, INC. a *California*
Corporation PLAINTIFF(S)
 v.

CASE NUMBER

SACV12-278-JKS (RNB)

LAVELLE INDUSTRIES, INC. a *Delaware*
 DEFENDANT(S).

SUMMONS

TO: DEFENDANT(S): LA VELLE INDUSTRIES, INC.

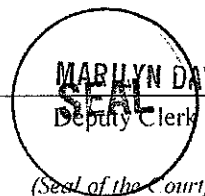
A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached ☒ complaint ☐ _____ amended complaint ☐ counterclaim ☐ cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, Richard P. Sybert, whose address is Gordon & Rees LLP, 101 W. Broadway, Suite 2000, San Diego, CA 92101. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Clerk, U.S. District Court

Dated: FEB 21 2012

By: _____



[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3)].

COPY

FILED

2012 FEB 21 PM 4:43
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

1 Richard P. Sybert, Bar No. 80731
email rsybert@gordonrees.com
2 Susan B. Meyer, Bar No. 204931
smeyer@gordonrees.com
3 Hazel Mae B. Pangan, Bar No. 272657
email hpangan@gordonrees.com
4 GORDON & REES LLP
101 W. Broadway, Suite 1600
5 San Diego, California 92101
tel (619) 696-6700 / fax (619) 696-7124
6

7 Attorneys for Plaintiff
FLUIDMASTER, INC.
8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11 FLUIDMASTER, INC, a California
12 corporation,
13 Plaintiff,
14 vs.
15 LAVELLE INDUSTRIES, INC., a Delaware
16 corporation,
17 Defendant.
18
19
20
21
22
23

CASE NO. SACV12-278-JVS (RMB)

COMPLAINT FOR:

1. Trademark
Infringement/False
Designation of Origin
[15 U.S.C. § 1125];
2. Declaratory Judgment
[38 U.S.C. §§ 2201, 2202; 15
U.S.C. § 1051 *et seq.*];
3. Unfair Competition
[Cal. Bus. & Prof. Code
§17200 *et seq.*];

DEMAND FOR JURY TRIAL
[Fed. R. Civ. Proc. 38]

24 Plaintiff FLUIDMASTER, INC. ("Plaintiff" or "Fluidmaster"), for its
25 Complaint against LAVELLE INDUSTRIES, INC. ("Defendant" or "Lavelle"),
26 alleges as follows:

27 ///
28 ///

1 internal flushing mechanisms of toilets, such as the Fluidmaster PerforMAX High
2 Performance Toilet Fill Valve.

3 8. On information and belief, Defendant Lavelle is a Delaware
4 Corporation with principal offices located at 665 McHenry Street, Burlington,
5 Wisconsin. On information and belief, Lavelle is principally engaged in the
6 business of manufacturing and distributing rubber and plastic products for use in the
7 plumbing industry. On information and belief, one such product is toilet fill valve
8 marketed and sold as the "Korky Quietfill MaxPERFORMANCE Toilet Fill
9 Valve."

10 **Fluidmaster's Intellectual Property Rights**

11 9. Through its design, development, sales, and marketing activities,
12 Fluidmaster has developed pioneering toilet plumbing and repair products that
13 adhere to stringent quality assurance standards and that are sold under the
14 Fluidmaster brand and associated marks. Fluidmaster's careful cultivation,
15 maintenance, and protection of its trademarks have enabled Fluidmaster to amass
16 considerable goodwill within its industry, and the Fluidmaster brand and its
17 associated marks are widely recognized around the world. Consumers readily and
18 singularly associate the Fluidmaster brand and its associated marks with
19 Fluidmaster's business and products.

20 10. Specifically, in 2009, Fluidmaster began using the mark "MAX" as
21 part of its "MAX Professional Series" of innovative toilet valve products.
22 Fluidmaster developed its PerforMAX mark and line of products in connection with
23 its MAX Professional Series of products.

24 11. Fluidmaster diligently protects its intellectual property through, *inter*
25 *alia*, trademark registration. Accordingly, Fluidmaster has applied for federal
26 registration of its PerforMAX mark, United States Patent and Trademark Office
27 ("USPTO") application serial number 85471431, for use in connection with its
28 toilet fill valves. Fluidmaster has continuously used its PerforMAX mark in

1 commerce through its sale and promotion of its toilet fill valve products in various
2 established channels of trade, including mass market retailers and specialty retailers
3 worldwide.

4 12. Defendant has applied for a word mark containing the term
5 "MaxPERFORMANCE" with the USPTO under application serial number
6 85430931 for use in connection with its toilet tank fill valves.

7 13. Fluidmaster used its PerforMAX mark in connection with its toilet fill
8 valve products before Lavelle used its purported MaxPERFORMANCE mark in
9 connection with its Korky Quietfill MaxPERFORMANCE Toilet Fill Valve.

10 **Ensuing Dispute Regarding Fluidmaster's PerforMAX Mark and Defendant's**

11 **Purported MaxPERFORMANCE Mark**

12 14. On October 21, 2011, Defendant sent an alleged "cease and desist"
13 letter to Fluidmaster, asserting ownership of the purported MaxPERFORMANCE
14 mark pursuant to USPTO application serial number 85430931 for use in connection
15 with "toilet tank fill valves." In its letter, Defendant alleged that Fluidmaster's use
16 of its PerforMAX mark was "likely to cause confusion among consumers and
17 therefore violate[d] [Defendant's] rights" under trademark law and constituted
18 unfair competition. Defendant further demanded that Fluidmaster cease and all use
19 of its PerforMAX mark on pain of formal legal action.

20 15. On November 9, 2011, Fluidmaster responded via letter, explaining
21 that it disagreed with Defendant's assertions of validity of its purported PerforMAX
22 mark, asserting that the mark was merely a generic, descriptive, and laudatory term
23 that was not registrable or enforceable and that in any event, Fluidmaster would
24 petition for the mark's cancellation in the event the USPTO issued a registration.

25 16. On November 15, 2011, Defendant responded with a letter requesting
26 evidence of Fluidmaster's use of its PerforMAX mark. On November 20, 2011,
27 Fluidmaster replied, declining to provide any informal discovery given the lack of
28 any obligation to do so. In its reply, Fluidmaster reiterated the main points of its

1 November 9, 2011 letter.

2 17. On January 23, 2012, Defendant sent another letter to Fluidmaster,
3 pointing to the approval of publication of Defendant's purported
4 MaxPERFORMANCE mark pursuant to its pending application for registration.
5 Defendant also renewed its demand that Fluidmaster cease its use of its PerformAX
6 mark.

7 18. On February 14, 2012, Fluidmaster responded via letter, declining to
8 accede to Defendant's demands and again explaining that it disagreed with
9 Defendant's allegations regarding the validity of its MaxPERFORMANCE mark
10 and claims of trademark infringement or unfair competition. Fluidmaster further
11 reiterated that Defendant's MaxPERFORMANCE mark was merely descriptive and
12 laudatory, and would cause consumers to look to other indicators of source.
13 Fluidmaster also noted that it had located internal documents evidencing prior
14 commercial treatment of its PerformAX mark whereas Defendant's declaration of
15 "January 00, 2011" and "March 00, 2011" for its first use and first use in commerce
16 dates, respectively, in its trademark registration application indicated that Defendant
17 had merely guessed on those dates.

18 **FIRST CLAIM FOR RELIEF**

19 **Trademark Infringement/False Designation of Origin**

20 **(15 U.S.C. § 1125(a))**

21 19. Fluidmaster repeats and realleges the allegations set forth above.

22 20. Defendant's use of its purported MaxPERFORMANCE mark in
23 interstate commerce is a false designation of origin causing a likelihood of
24 confusion, mistake, and deception as to source, sponsorship, affiliation, and/or
25 connection in the minds of the public. Defendant's conduct has infringed
26 Fluidmaster's trademark rights in violation of Section 43(a) of the Lanham Act, 15
27 U.S.C. 1125(a)(1).

28 21. By reason of the foregoing, Fluidmaster has been injured in an amount

not yet fully determined. Further, Defendant has been unjustly enriched by virtue of their deception of consumers and misappropriation of Fluidmaster's goodwill.

22. In addition, as a result of Defendant's acts of infringement, Fluidmaster has suffered and will continue to suffer irreparable harm for which Fluidmaster has no adequate remedy at law, including damage to Fluidmaster's goodwill. Unless Defendant's acts of infringement are enjoined by this Court, Fluidmaster will continue to suffer irreparable harm.

23. Defendant has acted knowingly and willfully, with full knowledge of the likelihood of confusion and with the intent to deceive consumers in order to trade off the efforts and earned goodwill and reputation of Fluidmaster.

24. By reason of the foregoing acts of trademark infringement, Fluidmaster has been injured in an amount not yet ascertained. Further, Defendant has been unjustly enriched by virtue of their deception of consumers and misappropriation of Fluidmaster's goodwill.

SECOND CLAIM FOR RELIEF

Declaratory Judgment

(38 U.S.C. §§ 2201, 2202; 15 U.S.C. § 1051 *et seq.*)

25. Fluidmaster repeats and realleges the allegations set forth above.

26. Defendant has asserted that it owns the alleged trademark MaxPERFORMANCE and that Fluidmaster, through use of the mark PerforMAX, infringe Defendant's mark.

27. Based on Defendant's assertions, FluidMaster has a reasonable apprehension of being sued for infringement of Defendant's alleged MaxPERFORMANCE mark.

28. Accordingly, there is a present and justiciable controversy between Fluidmaster and Defendant as to the latter's right to threaten or maintain suit for infringement of the alleged MaxPERFORMANCE mark and as to whether Fluidmaster infringes the alleged MaxPERFORMANCE mark.

1 **THIRD CLAIM FOR RELIEF**

2 **State Law Unfair Competition**

3 **(California Bus. & Profs. Code § 17200 *et seq.*)**

4 29. Fluidmaster repeats and realleges the allegations set forth above.

5 30. California Business and Professions Code Section 17200 prohibits
6 acts, which constitute “unlawful, unfair or fraudulent business practices.”

7 31. Defendant’s unauthorized use of its purported MaxPERFORMANCE
8 mark in violation of Fluidmaster’s rights in its PerforMAX mark as alleged herein
9 constitutes unfair business acts or practices within the meaning of California
10 Business and Professions Code Section 17200.

11 32. Fluidmaster has been, and without this Court’s intercession will
12 continue to be, irreparably harmed by Defendant’s business practices. Fluidmaster
13 has no adequate remedy at law to prevent this irreparable harm. Fluidmaster is
14 entitled to an injunction enjoining Defendant from engaging further in the same or
15 similar unlawful, unfair, or fraudulent business practices, or unfair, deceptive,
16 untrue, or misleading advertising or statements.

17 33. Defendant should be ordered to account for and disgorge all profits
18 received from their pattern and practice of unlawful activities described herein, and
19 to pay Fluidmaster’s attorney’s fees incurred in this action.

20 **PRAYER FOR RELIEF**

21 WHEREFORE, Fluidmaster demands judgment against Defendant as
22 follows:

23 **On All Claims:**

24 1. For such damages as Fluidmaster has suffered, in consequence of
25 Defendant’s above-described acts which injured Fluidmaster;

26 2. For an award of reasonable attorneys’ fees and costs incurred in this
27 action;

1 3. For punitive damages according to proof on the first and third claims
2 for relief;

3 4. For an accounting, and disgorgement of profits;

4 5. For such other and further relief as is just and proper.

5 On the Second Claim:

6 1. For entry of judgment that Fluidmaster owns the PerforMAX mark
7 and does not infringe Defendant's alleged MaxPERFORMANCE mark; and that
8 Defendant is without any right or authority to threaten or maintain suit against
9 Fluidmaster for alleged infringement of the alleged MaxPERFORMANCE mark;

10 2. For an entry of an injunction enjoining Defendant, its agents,
11 employees, assigns, and attorneys and those persons in active concert or
12 participation with them, or any one of them, from initiating infringement litigation
13 and from threatening Fluidmaster with infringement litigation and from charging
14 Fluidmaster either verbally or in writing with infringement of the alleged
15 MaxPERFORMANCE mark;

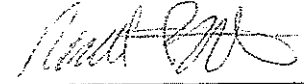
16 3. For an entry of judgment for Fluidmaster's costs and reasonable
17 attorneys' fees incurred herein; and

18 4. For such other and further relief as is just and proper.

19
20 Dated: February 21, 2012

Respectfully submitted,
GORDON & REES LLP

21
22 by


Richard P. Sybert
Susan B. Meyer
Hazel Mae B. Pangan
Attorneys for Plaintiff
FLUIDMASTER, INC.

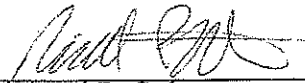
DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38, Plaintiff FLUIDMASTER, INC. hereby demands trial by jury of all claims so triable.

Dated: February 21, 2012

Respectfully submitted,
GORDON & REES LLP

by


Richard P. Sybert
Susan B. Meyer
Hazel Mae B. Pangan
Attorneys for Plaintiff
FLUIDMASTER, INC.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

I (a) PLAINTIFFS (Check box if you are representing yourself <input type="checkbox"/>) FLUIDMASTER, INC., a California corporation		DEFENDANTS LAVELLE INDUSTRIES, INC., a Delaware Corporation	
(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.) Richard P. Sybert (Bar No. 80731); Susan B. Meyer (Bar No. 204931; Hazel Mae B. Pangan (Bar No. 272657) 101 W. Broadway, Suite 1600 San Diego, CA 92101 Tel: 619-696-6700 Fax: 619-696-7124		Attorneys (If Known)	

II. BASIS OF JURISDICTION (Place an X in one box only.) <input type="checkbox"/> 1 U.S. Government Plaintiff <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 2 U.S. Government Defendant <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant.) <table style="width:100%; border: none;"> <tr> <td style="width:33%;"></td> <td style="width:33%; text-align: center;">PTF DEF</td> <td style="width:33%;"></td> <td style="width:33%; text-align: center;">PTF DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1 <input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business in this State</td> <td style="text-align: center;"><input type="checkbox"/> 4 <input type="checkbox"/> 4 of</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2 <input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5 <input type="checkbox"/> 5 of</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3 <input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6 <input type="checkbox"/> 6</td> </tr> </table>		PTF DEF		PTF DEF	Citizen of This State	<input type="checkbox"/> 1 <input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	<input type="checkbox"/> 4 <input type="checkbox"/> 4 of	Citizen of Another State	<input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5 <input type="checkbox"/> 5 of	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6
	PTF DEF		PTF DEF														
Citizen of This State	<input type="checkbox"/> 1 <input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	<input type="checkbox"/> 4 <input type="checkbox"/> 4 of														
Citizen of Another State	<input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5 <input type="checkbox"/> 5 of														
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6														

IV. ORIGIN (Place an X in one box only.) <input checked="" type="checkbox"/> 1 Original Proceeding <input type="checkbox"/> 2 Removed from State Court <input type="checkbox"/> 3 Remanded from Appellate Court <input type="checkbox"/> 4 Reinstated or Reopened <input type="checkbox"/> 5 Transferred from another district (specify): <input type="checkbox"/> 6 Multi-District Litigation <input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judge	
--	--

V. REQUESTED IN COMPLAINT: JURY DEMAND: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No (Check 'Yes' only if demanded in complaint)	
CLASS ACTION under F.R.C.P. 23: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	MONEY DEMANDED IN COMPLAINT: \$ 75,000+

VI. CAUSE OF ACTION (Cite the U. S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
 Trademark Infringement/False Designation of Origin (15 U.S.C. 1125); Declaratory Judgment (38 U.S.C. §§ 2201, 2202; 15 U.S.C. § 1051 *et seq.*)

VII. NATURE OF SUIT (Place an X in one box only.)					
OTHER STATUTES <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Act <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Info. Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes	CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	TORTS PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Fed. Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury-Med Malpractice <input type="checkbox"/> 365 Personal Injury-Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus-Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	TORTS PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability BANKRUPTCY <input type="checkbox"/> 22 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 American with Disabilities - Employment <input type="checkbox"/> 446 American with Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus/Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition FORFEITURE / PENALTY <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety /Health <input type="checkbox"/> 690 Other	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 611IA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW 405(g) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609

FOR OFFICE USE ONLY: Case Number. SACV12-278

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET**

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? ☒ No ☐ Yes

If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? ☒ No ☐ Yes

If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:

- (Check all boxes that apply) ☐ A. Arise from the same or closely related transactions, happenings, or events; or
☐ B. Call for determination of the same or substantially related or similar questions of law and fact; or
☐ C. For other reasons would entail substantial duplication of labor if heard by different judges; or
☐ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

(a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH named plaintiff resides.

☐ Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Fluidmaster, Inc. - Orange County	

(b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH named defendant resides.

☐ Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Orange County	

(c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH claim arose.

Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Orange County	

* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties

Note: In land condemnation cases, use the location of the tract of land involved.

X. SIGNATURE OF ATTORNEY (OR PRO PER):

RICHARD P. SYBERT

Date February 21, 2012

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended, plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))

FILED

COPY

NAME, ADDRESS & TELEPHONE NUMBER OF ATTORNEY(S) FOR, OR, PLAINTIFF OR
DEFENDANT IF PLAINTIFF OR DEFENDANT IS PRO PER

Richard P. Sybert (SBN: 08731)
Susan B. Meyer (SBN: 204931)
Hazel Mae B. Pangan (SBN: 272657)
GORDON & REES LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101
Telephone: (619) 696-6700
Facsimile: (619) 696-7124
ATTORNEYS FOR: FLUIDMASTER, INC.

2012 FEB 21 PM 4:43

CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

BY _____

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FLUIDMASTER, INC., a California Corporation,

Plaintiff(s),

v.

LAVELLE INDUSTRIES, INC., a Delaware Corporation,

Defendant(s)

CASE NUMBER

SACV12-278-JVS(LRNBA)

CERTIFICATION AND NOTICE
OF INTERESTED PARTIES
(Local Rule 7.1-1)

TO: THE COURT AND ALL PARTIES APPEARING OF RECORD:

The undersigned, counsel of record for FLUIDMASTER, INC.

(or party appearing in pro per), certifies that the following listed party (or parties) may have a direct, pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal. (Use additional sheet if necessary.)

PARTY

(List the names of all such parties and identify their connection and interest.)

None

CONNECTION

N/A

February 21, 2012

Date

Sign

Richard P. Sybert

Attorney of record for or party appearing in pro per
FLUIDMASTER, INC.



FILED

2012 FEB 21 PM 4:45

CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FLUIDMASTER, INC.

PLAINTIFF(S)

V.

LAVELLE INDUSTRIES, INC.

DEFENDANT(S)

CASE NUMBER

SACV12- 278 JVS (RNBx)

NOTICE TO PARTIES OF
COURT-DIRECTED ADR PROGRAM

NOTICE TO PARTIES:

It is the policy of this Court to encourage settlement of civil litigation when such is in the best interest of the parties. The Court favors any reasonable means, including alternative dispute resolution (ADR), to accomplish this goal. See Civil L.R. 16-15. Unless exempted by the trial judge, parties in all civil cases must participate in an ADR process before trial. See Civil L.R. 16-15.1.

The district judge to whom the above-referenced case has been assigned is participating in an ADR Program that presumptively directs this case to either the Court Mediation Panel or to private mediation. See General Order No. 11-10, §5. A settlement conference with a Magistrate Judge is generally not available to the parties. For more information about the Mediation Panel, visit the Court website, www.cacd.uscourts.gov, under "ADR."

Pursuant to Civil L.R. 26-1(c), counsel are directed to furnish and discuss with their clients the attached ADR Notice To Parties before the conference of the parties mandated by Fed.R.Civ.P. 26(f). Based upon the consultation with their clients and discussion with opposing counsel, counsel must indicate the following in their Joint 26(f) Report: 1) whether the case is best suited for mediation with a neutral from the Court Mediation Panel or private mediation; and 2) when the mediation should occur. See Civil L.R. 26-1(c).

At the initial scheduling conference, counsel should be fully prepared to discuss their preference for referral to the Court Mediation Panel or to private mediation and when the mediation should occur. The Court will enter an Order/Referral to ADR at or around the time of the scheduling conference.

Clerk, U.S. District Court

Dated: Tuesday, February 21, 2012

By: MDAVIS

Deputy Clerk

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**NOTICE TO PARTIES: COURT POLICY ON SETTLEMENT
AND USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR)**

Counsel are required to furnish and discuss this Notice with their clients.

Despite the efforts of the courts to achieve a fair, timely and just outcome in all cases, litigation has become an often lengthy and expensive process. For this reason, it is this Court's policy to encourage parties to attempt to settle their disputes, whenever possible, through alternative dispute resolution (ADR).

ADR can reduce both the time it takes to resolve a case and the costs of litigation, which can be substantial. ADR options include mediation, arbitration (binding or non-binding), neutral evaluation (NE), conciliation, mini-trial and fact-finding. ADR can be either Court-directed or privately conducted.

The Court's ADR Program offers mediation through a panel of qualified and impartial attorneys who will encourage the fair, speedy and economic resolution of civil actions. Panel Mediators each have at least ten years legal experience and are appointed by the Court. They volunteer their preparation time and the first three hours of a mediation session. This is a cost-effective way for parties to explore potential avenues of resolution.

This Court requires that counsel discuss with their clients the ADR options available and instructs them to come prepared to discuss the parties' choice of ADR option (settlement conference before a magistrate judge; Court Mediation Panel; private mediation) at the initial scheduling conference. Counsel are also required to indicate the client's choice of ADR option in advance of that conference. See Civil L.R. 26-1(c) and Fed.R.Civ.P. 26(f).

Clients and their counsel should carefully consider the anticipated expense of litigation; the uncertainties as to outcome, the time it will take to get to trial, the time an appeal will take if a decision is appealed, the burdens on a client's time, and the costs and expenses of litigation in relation to the amounts or stakes involved.

Of the more than 9,000 civil cases filed in the District annually, less than 2 percent actually go to trial. The remaining cases are, for the most part: settled between the parties; voluntarily dismissed; resolved through Court-directed or other forms of ADR; or dismissed by the Court as lacking in merit or for other reasons provided by law.

For more information about the Court's ADR Program, the Mediation Panel, and the profiles of mediators, visit the Court website, www.cacd.uscourts.gov, under "ADR."

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

This case has been assigned to District Judge James V. Selna and the assigned discovery Magistrate Judge is Robert N. Block.

The case number on all documents filed with the Court should read as follows:

SACV12- 278 JVS (RNBx)

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

=====

NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

☐ **Western Division**
312 N. Spring St., Rm. G-8
Los Angeles, CA 90012

☒ **Southern Division**
411 West Fourth St., Rm. 1-053
Santa Ana, CA 92701-4516

☐ **Eastern Division**
3470 Twelfth St., Rm. 134
Riverside, CA 92501

Failure to file at the proper location will result in your documents being returned to you.

UNITED STATE DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE TO COUNSEL

The court has directed that the following rules be specifically called to your attention:

- I. Continuing Obligation to Report Related Cases (Local Rule 83-1.3.3)
- II. Service of Papers and Process (Local Rule 4)

I. CONTINUING OBLIGATION TO REPORT RELATED CASES

Parties are under the continuing obligation to promptly advise the Court whenever one or more civil actions or proceedings previously commenced and one or more currently filed appear to be related.

Local Rule 83-1.3.3 states: "It shall be the continuing duty of the attorney in any case promptly to bring to the attention of the Court, by the filing of a Notice of Related Case(s) pursuant to Local Rule 83-1.3, all facts which in the opinion of the attorney or party appear relevant to a determination whether such action and one or more pending actions should, under the criteria and procedures set forth in Local Rule 83-1.3, be heard by the same judge."

Local Rule 83-1.2.1. states: "It is not permissible to dismiss and thereafter refile an action for the purpose of obtaining a different judge."

Local Rule 83-1.2.2 provides: Whenever an action is dismissed by a party or by the Court before judgment and thereafter the same or essentially the same claims, involving the same or essentially the same parties, are alleged in another action, the later-filed action shall be assigned to the judge to whom the first-filed action was assigned. It shall be the duty of every attorney in any such later-filed action to bring those facts to the attention of the Court in the Civil Cover Sheet and by the filing of a Notice of Related Case(s) pursuant to L.R. 83-1.3.

II. SERVICE OF PAPERS AND PROCESS

Local Rule 4-2 states: "Except as otherwise provided by order of Court, or when required by the treaties or statutes of the United States, process shall not be presented to a United States Marshal for Service." Service of process must be accomplished in accordance with Rule 4 of the Federal Rules of Civil Procedure or in any manner provided by State Law, when applicable. Service upon the United States, an officer or agency thereof, shall be served pursuant to the provisions of FRCP 4 (i). Service should be promptly made; unreasonable delay may result in dismissal of the action under Local Rule 41 and Rule 4(m) of the Federal Rules of Civil Procedure. Proof of service or a waiver of service of summons and complaint must be filed with the court.

This notice shall be given by the Clerk to the plaintiff at the time an action is filed (or to the defendant at the time a notice of removal is filed), and by the plaintiff to other parties as attachments to copies of the complaint and summonses, or by the defendant to other parties as attachments to copies of the notice to plaintiffs of removal to federal court, when served.

Ordering Transcripts

District court will not produce transcripts unless the order is received by the court clerk at least 10 business days before the date of the trial. To identify a transcript, you must provide the court with the case name, case number, and the date of the trial. For specific information, please call the court clerk at (213) 894-0658. Appropriate fee schedule is on the website: Go to Court Reporter Schedule, then view all and select the district court to check. Transcript orders from magistrate judge court should be placed with the Court Reporting Section of the Records Department. Please refer to the website for the necessary telephone numbers, applicable fees, and identification of court reporter assignments. For more information, you can call the court reporter schedule office at 213-894-0658.

Ordering Realtime Connection

Realtime reporting connection should be requested in advance of the trial. Please contact the court reporter at the court reporter's office to request the realtime connection. There is a separate charge for the realtime connection. Please refer to the transcript rates to determine the cost. The only court reporter who may connect to realtime and charge for realtime is the court reporter who is assigned to the trial. Many reporters will not connect to realtime connection. Realtime transcripts being ordered. The attorney must bring his or her own laptop computer.

Ordering Transcripts

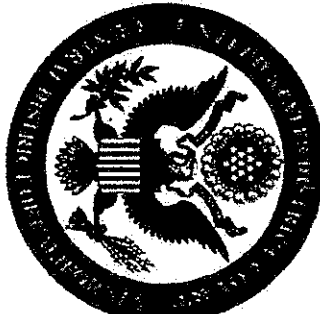
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UNITED STATES
DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA

WESTERN DISTRICT OF
U.S. Courthouse
Charles Office, Room 108
312 North Spring Street
Los Angeles, California 90012
213-894-1565

UNITED STATES
DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA



Clerk's Office
Services for Attorneys
and the
General Public

October 2010

The United States District Court Central District of California is one of the largest federal courts in the nation. The clerk's office has put this brochure together to provide a quick reference for attorneys and the general public regarding the services that are currently available. Feedback and suggestions as to how we might improve our service are always appreciated.

Website

Information about the district court may be obtained online. Users can gather information about attorney admissions and filing procedures, review master and daily calendars, requirements for court appearances, Local Rules, General Orders, and recently issued and published opinions, obtain extensive attorney assistance information and available court services, download court forms, and keep apprised of recent innovations in the clerk's office. Visit the court's website at www.cacd.uscourts.gov.

Office Hours

The clerk's office hours are 10:00 a.m. - 4:00 p.m., Monday - Friday, excluding court-observed holidays. The drop-off box service has been discontinued. For emergency filings between 4:00 p.m. - 5:00 p.m., call Western Division: 213-894-2127, Southern Division: 714-338-4764/4760; Eastern Division: 951-328-4470. After 5:00 p.m., call 213-894-2485.

WebPACER

The "Public Access to Court Electronic Records" (PACER) is a browser-based electronic retrieval system that provides criminal and civil summaries and docket information using a computer terminal. PACER also provides access to images of electronically filed court documents. The PACER service is available 24 hours a day, including weekends. To establish a PACER account, contact the PACER Service Center: 800-676-6856.

Records

All pending criminal, civil, magistrate, and multi-district litigation (MDL) cases may be reviewed, at no charge, at the clerk's office. Case files and dockets may be viewed on the same day as requested unless the requested material is unavailable. Certain closed cases are located at the court's storage facility and may be ordered, viewed and copies obtained directly from National Archives and Records Administration (NARA) at 951-936-2000. You will need to provide the accession location and box numbers to NARA for file retrieval. This information may be obtained from the court's website at www.cacd.uscourts.gov. If there are no search results, call Western Division: 213-894-3809; email:

to records: caacd@caacd.uscourts.gov; Southern Division: 714-338-4785; Eastern Division: 951-328-4450. To identify which clerk's office maintains the case file you wish to view, please refer to the prefix of the case number (two digits after the letters represent the filing year; for example, 09 is year 2009) as follows:

Western Division (Los Angeles)	
CV 09-0000 - civil	CR 09-0000 - criminal
Southern Division (Santa Ana)	
SA CV 09-0000 - civil	SA CR 09-0000 - criminal
Eastern Division (Riverside)	
ED CV 09-0000 - civil	ED CR 09-0000 - criminal

There is a charge for copies, certifications, and exemplifications. For more information on closed or archived court records, visit the court's website at www.cacd.uscourts.gov/records.

Photocopy Service

Photocopy services are available from outside copy services. Please note that exemplifications and certifications must still be obtained from the clerk's office. For payment options, contact the appropriate vendors: Western Division: 213-253-9413; Southern Division: 714-543-8123; Eastern Division: 951-328-4470.

Interpreter Services

The interpreter services section of the clerk's office provides interpreters for all court proceedings instituted by the United States that require the use of a language other than English. The section also makes interpreter referrals in response to inquiries from law firms and the general public in cases where court-appointed interpreters are not indicated. For further information, please call 213-894-4370 or visit the court's website at www.cacd.uscourts.gov/interpreters.

Jury Section

The court's website offers valuable information to prospective jurors. You may see responses to frequently asked questions, read the General Order 07-10 regarding the selection of Grand and Petit Jurors, download the jury handbook, review jury information for all three divisions, and verify your status/instructions utilizing the Automated Juror Information System (AJIS). Submit questions or comments to the jury section at jury@caacd.uscourts.gov. Wired and wireless Internet access is available in jury assembly rooms.

Attorney Work Room

For attorneys, a work room is located on the second floor of the Spring Street Courthouse, on the first floor of the

Ronald Reagan Building on the tenth floor of the Ronald Reagan Federal Building and U.S. Courthouse, and on the third floor of the Riverside Courthouse. The workrooms have Pentium personal computers with access to Westlaw, WordPerfect, and PACER, laser printers, wired and wireless Internet access, storage lockers, copy machines, and individual conference rooms.

Evidence Prescans

The clerk's office has evidence prescans available for attorneys to use in court proceedings. This technology connects an overhead projector to monitors which display pictures for the judge, attorneys and the jury. There is no charge for using the equipment; however, due to the high demand for its use, the equipment is reserved on a first-come, first-served basis. For more information or to reserve the equipment, visit the court's website or contact the appropriate divisions: Western Division at 213-894-3061, Southern Division at 714-338-4785, and Eastern Division at 951-328-4450 or 951-328-4451.

Videoconferencing

Videoconferencing allows parties at off-site locations to appear at court hearings by way of two-way audio and visual monitors. The appropriate courtroom deputy clerk should be contacted as to whether use of this equipment in the courtroom is permitted for the specific hearing or trial. There are minimal telephone charges but no equipment charges for use of the unit. For more information or to reserve the equipment, visit the court's website or contact the courts Space and Facilities Help Desk at 213-894-3061.

E-Filing

With limited exceptions, all cases are subject to e-filing as governed by General Order 08-02, as amended by General Order 08-14. Please visit the CM/EGF web page at www.cacd.uscourts.gov/cmefg or call the CM/EGF Help Desk at 213-894-0342.

Pro Se

The Federal Pro Se Self-Represented Litigant Clinic is located on the fifth floor, Room 525, in the Federal Courthouse at 612 North Spring Street, Los Angeles, California. The Pro Se Clinic, which is staffed by a lawyer, offers on-site information and guidance to individuals who are representing themselves (without an attorney) in civil actions in the United States District Court. For more information, call 213-894-2977, Ext. 270, or visit the court's website at www.cacd.uscourts.gov/prose.

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA CIVILITY AND PROFESSIONALISM GUIDELINES

Preamble

In its purest form, law is simply a societal mechanism for achieving justice. As officers of the court, judges and lawyers have a duty to use the law for this purpose, for the good of the people. Even though "justice" is a lofty goal, one which is not always reached, when an individual becomes a member of the legal profession, he or she is bound to strive towards this end.

*...there is a growing sense that
lawyers regard their livelihood as a business,
rather than a profession.*

Unfortunately, many do not perceive that achieving justice is the function of law in society today. Among members of the public and lawyers themselves, there is a growing sense that lawyers regard their livelihood as a business, rather than a profession. Viewed in this manner, the lawyer may define his or her ultimate goal as "winning" any given case, by whatever means possible, at any cost, with little sense of whether justice is being served. This attitude manifests itself in an array of obstinate discovery tactics, refusals to accommodate the reasonable requests of opposing counsel re: dates, times, and places; and other needless, time-consuming conflicts between and among adversaries. This type of behavior tends to increase costs of litigation and often leads to the denial of justice.

The Central District recognizes that, while the majority of lawyers do not behave in the above-described manner, in recent years there has been a discernible erosion of civility and professionalism in our courts. This disturbing trend may have severe consequences if we do not act to reverse its course. Incivil behavior does not constitute effective advocacy; rather, it serves to increase liti-

gation costs and fails to advance the client's lawful interests. Perhaps just as importantly, this type of behavior causes the public to lose faith in the legal profession and its ability to benefit society. For these reasons, we find that civility and professionalism among advocates, between lawyer and client, and between bench and bar are essential to the administration of justice.

The following guidelines are de-

signed to encourage us, the members of the bench and bar, to act towards each other, our clients, and the public with the dignity and civility that our profession demands. In formulating these guidelines, we have borrowed heavily from the efforts of others who have written similar codes for this same purpose. *The Los Angeles County Bar Association Litigation Guidelines*, guidelines issued by other county bar associations within the Central District, the *Standards for Professional Conduct within the Seventh Federal Judicial Circuit*, and the *Texas Lawyer's Creed* all provide excellent models for professional behavior in the law.

We expect that judges and lawyers will voluntarily adhere to these standards as part of a mutual commitment to the elevation of the level of practice in our courts. These guidelines shall not be used as a basis for litigation or for sanctions or penalties.

Nothing in these guidelines supersedes or modifies the existing Local Rules of the Central District, nor do they alter existing standards of conduct wherein lawyer negligence may be determined and/or examined.

I. Guidelines

A. Lawyers' Duties to Their Clients

1. We will practice our profession with a continuing awareness that our role is to advance the legitimate interests of our clients. We will endeavor to achieve our clients' lawful objectives in legal transactions and in litigation as quickly and economically as possible.
2. We will be loyal and committed to our clients' lawful objectives, but we will not permit that loyalty and commitment to interfere with our duty to provide objective and independent advice.
3. We will advise our clients that civility and courtesy are expected and are not a sign of weakness.
4. We will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that we act in an abusive manner or indulge in any offensive conduct.
5. We will advise our clients that we will not pursue conduct that is intended primarily to harass or drain the financial resources of the opposing party.
6. We will advise our clients that we reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect our clients' lawful objectives. Clients have no right to instruct us to refuse reasonable requests made by other counsel.
7. We will advise our clients regarding availability of mediation, arbitration, and other alternative meth-

ods of resolving and settling disputes.

8. We will advise our clients of the contents of this creed when undertaking representation.

B. Lawyers' Duties to Other Counsel

1. Communications with Adversaries

- a. We will adhere to all express promises and to agreements with other counsel, whether oral or in writing, and will adhere in good faith to all agreements implied by the circumstances or local customs.
- b. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide the other counsel with the opportunity to review the writing. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to the attention of other counsel. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.
- c. We will not write letters for the purpose of ascribing to opposing counsel a position he or she has not taken, or to create "a record" of events that have not occurred. Letters intended only to make a record should be used sparingly and only when thought to be necessary under all of the circumstances. Unless specifically permitted or invited by the court, letters between counsel should not be sent to judges.

2. Scheduling Issues

- a. We will not use any form of discovery or discovery scheduling as a means of harassment.
- b. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.
- c. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel, where it is possible to do so without prejudicing the client's rights. If we have been given an accommodation because of a calendar conflict, we will notify those who have accommodated us as soon as the conflict has been removed.
- d. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences are to be canceled or postponed. Early notice avoids unnecessary travel and expense of counsel and may enable the court to use the previously reserved time for other matters.
- e. Unless time is of the essence, as a matter of courtesy we will grant first requests for reasonable extensions of time to respond to litigation deadlines. After a first extension, any additional requests for time will be considered by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of personal and professional engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.

- f. We will not request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.

- g. We will not attach to extensions unfair and extraneous conditions. We may impose conditions for the purpose of preserving rights that an extension might jeopardize, or for seeking reciprocal scheduling concessions. We will not, by granting extensions, seek to preclude an opponent's substantive rights, such as his or her right to move against a complaint.

3. Service of Papers

- a. We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.
- b. We will not serve papers sufficiently close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.
- c. We will not serve papers in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on a Friday afternoon or the day preceding a secular or religious holiday.
- d. When it is likely that service by mail, even when allowed, will prejudice the opposing party, we will effect service personally or by facsimile transmission.

4. Depositions

- a. We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. We will not take depositions

for the purpose of harassment or to increase litigation expense.

- b. We will not engage in any conduct during a deposition that would be inappropriate in the presence of a judge.
- c. During depositions we will ask only those questions we reasonably believe are necessary for the prosecution or defense of an action. We will not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition. We will refrain from repetitive or argumentative questions or those asked solely for purposes of harassment.
- d. When defending a deposition, we will limit objections to those that are well founded and necessary to protect our client's interests. We recognize that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought.
- e. When a question is pending, we will not, through objections or otherwise, coach the deponent or suggest answers.
- f. We will not direct a deponent to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass.
- g. When we obtain documents pursuant to a deposition subpoena, we will make copies of the documents available to opposing counsel at his or her expense, even if the deposition is canceled or adjourned.

5. Document Demands

- a. We will carefully craft document production requests so they are limited to those documents we reason-

ably believe are necessary for the prosecution or defense of an action. We will not design production requests to harass or embarrass a party or witness or to impose an undue burden or expense in responding.

- b. We will respond to document requests in a timely and reasonable manner and not strain to interpret the request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents.
- c. We will withhold documents on the grounds of privilege only where it is appropriate to do so.
- d. We will not produce documents in a disorganized or unintelligible manner, or in a way designed to hide or obscure the existence of particular documents.
- e. We will not delay document production to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.

6. Interrogatories

- a. We will carefully craft interrogatories so that they are limited to those matters we reasonably believe are necessary for the prosecution or defense of an action, and we will not design them to harass or place an undue burden or expense on a party.
- b. We will respond to interrogatories in a timely and reasonable manner and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.
- c. We will base our interrogatory objections on a good faith belief in their merit and not for the purpose of withholding or delaying the disclosure of relevant information. If

an interrogatory is objectionable in part, we will answer the unobjectionable part.

7. Settlement and Alternative Dispute Resolution

- a. Except where there are strong and overriding issues of principle, we will raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussion meaningful.
- b. We will not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.
- c. In every case, we will consider whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation, or other forms of alternative dispute resolution.

8. Written Submissions to a Court, Including Briefs, Memoranda, Affidavits, Declarations, and Proposed Orders.

- a. Before filing a motion with the court, we will engage in more than a mere *pro forma* discussion of its purpose in an effort to resolve the issue with opposing counsel.
- b. We will not force our adversary to make a motion and then not oppose it.
- c. In submitting briefs or memoranda of points and authorities to the court, we will not rely on facts that are not properly part of the record. We may present historical, economic, or sociological data, if such data appears in or is derived from generally available sources.

d. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.

e. Unless directly and necessarily in issue, we will not disparage the intelligence, morals, integrity, or personal behavior of our adversaries before the court, either in written submissions or oral presentations.

f. We will not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.

g. We will not move for court sanctions against opposing counsel without first conducting a reasonable investigation, and unless fully justified by the circumstances and necessary to protect our client's lawful interests.

h. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.

i. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.

9. *Ex Parte* Communications With the Court

a. We will avoid *ex parte* communication on the substance of a pending case with a judge (or his or her law clerk) before whom such case is pending.

b. Even where applicable laws or rules permit an *ex parte* application or communication to the court, before making such an application or com-

munication we will make diligent efforts to notify the opposing party or his or her attorney. We will make reasonable efforts to accommodate the schedule of such attorney, so that the opposing party may be represented on the application.

c. Where the rules permit an *ex parte* application or communication to the court in an emergency situation, we will make such an application or communication only where there is a *bona fide* emergency such that the lawyer's client will be seriously prejudiced by a failure to make the application or communication on regular notice.

C. Lawyers' Duties to the Court

1. We will speak and write civilly and respectfully in all communications with the court.

2. We will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time; if delayed, we will notify the court and counsel, if possible.

3. We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

4. We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.

5. We will not write letters to the court in connection with a pending action, unless invited or permitted by the court.

6. Before dates for hearing or trials are set, or if that is not feasible, immediately after such date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

7. We will act and speak civilly to court marshals, court clerks, court reporters, secretaries, and law clerks with an awareness that they, too, are an integral part of the judicial system.

D. Judges' Duties to Others

1. We will be courteous, respectful, and civil to the attorneys, parties, and witnesses who appear before us. Furthermore, we will use our authority to ensure that all of the attorneys, parties, and witnesses appearing in our courtrooms conduct themselves in a civil manner.

2. We will do our best to ensure that court personnel act civilly toward attorneys, parties and witnesses.

3. We will not employ abusive, demeaning, or humiliating language in opinions or in written or oral communications with attorneys, parties, or witnesses.

4. We will be punctual in convening all hearings, meetings, and conferences.

5. We will make reasonable efforts to decide promptly all matters presented to us for decision.

6. While endeavoring to resolve disputes efficiently, we will be aware of the time constraints and pressures imposed on attorneys by the exigencies of litigation practice.

7. Above all, we will remember that the court is the servant of the people, and we will approach our duties in this fashion.